

Office of Chief Counsel
Internal Revenue Service

memorandum

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MJCalabrese

date:

to: Chief, Collection Division, Midwest District,
Attn: Manager, General Advisory I

from: District Counsel, Midwest District, Milwaukee

subject: Opinion - Levy on Right to Social Security Payment

ISSUE

1. Whether a single levy on social security benefits attaches the right to receive future benefits.

2. Whether anyone in the Service is authorized to issue continuous levies pursuant to I.R.C. § 6331(h).

CONCLUSION

1. A single levy on social security benefits attaches the fixed right to receive future benefits.

2. The Secretary has not yet delegated to anyone in field the authority to issue continuous levies pursuant to I.R.C. § 6331(h).

FACTS

In some cases involving uncooperative taxpayers, the only distrainable asset is the taxpayer's right to receive social security payments. On occasion the Service has had to levy on the Social Security Administration. A question has arisen as to whether the levy attaches the entire benefit or just the amount of the monthly payment currently due the taxpayer.

ANALYSIS

1. A single levy attaches a taxpayer's entire social security benefit as a fixed unqualified right to a future benefit

The federal tax lien attaches to all property and rights to

property belonging to a taxpayer. I.R.C. § 6321. The lien continues until the assessed liability is satisfied or becomes unenforceable by lapse of time. I.R.C. § 6322. The lien attaches to any property or rights to property acquired while the lien is in effect. Treas. Reg. § 301.6321-1.

Upon a taxpayer's neglect or refusal to pay a tax liability, I.R.C. § 6331 provides the Service with the authority to levy upon the property and rights to property belonging to the taxpayer or property on which there is a tax lien. I.R.C. § 6334 exempts certain property from levy. These exemptions do not include social security benefits.

The levy and tax lien provide the Internal Revenue Service with whatever rights the taxpayer himself has. See Aquilino v. United States, 363 U.S. 509 (1960); St. Louis Union Trust Company v. United States, 617 F.2d 1293 (8th Cir. 1980). Having levied upon the taxpayer's right to property, the IRS steps into the taxpayer's shoes "and acquires whatever rights the taxpayer himself possesses." United States v. National Bank of Commerce, 472 U.S. 713, 725 (1985).

I.R.C. § 6331(e) and (h) provide for continuing levies on salaries, wages, and "specified payments"; otherwise "a levy extends only to property possessed and obligations which exist at the time of the levy." Treas. Reg. § 301.6331-1(a)(1). Providing further, the regulation states that "[o]bligations exist when the liability of the obligor is fixed and determinable although the right to receive payment thereof may be deferred until a later date." Id. A levy attaches a taxpayer's unqualified fixed right to future payments. See Rev. Rul. 55-210, 1955-1 C.B. 544. The levy on a fixed right involving a stream of future payments will require payment to the Service whenever the right becomes payable to the taxpayer.

Work history, age, disability, and/or certain other factors fixes a person's right to social security benefits. The social security beneficiary then has a fixed right to receive a stream of payments. A social security beneficiary has no obligation to perform future services (as does an employee who receives wages) or behave in any other manner in order to receive benefits. Once the beneficiary qualifies, the liability of the Social Security Administration is fixed and determinable. The beneficiary need do nothing further.

A single levy on the Social Security Administration attaches the right to receive future payments. A levy using Form 668-A will attach the entire social security benefit, including payments payable in the future. A Form 668-W, the continuing levy form used

to attach wages, is not needed to attach the taxpayer's social security benefits payable in the future. The information on exemptions that the Service provides with Forms 668-W may be provided with a Form 668-A, to the extent that the payor needs the information for computing exemption amounts.

A number of cases in the bankruptcy courts have involved a similar issue with respect to the tax lien on pension benefits and annuity rights. The courts recognize that the tax lien and levy attach the entire benefit (to the extent of the tax liability) and not just the monthly payment due at the time of service of the levy. See In re Wesche, 193 B.R. 76 (Bankr. M.D. Fla. 1996) (the federal tax lien attaches the taxpayer's right to future pension benefits); In re Wessel, 161 B.R. 155 (Bankr. D. S.C. 1993) (the tax lien attached to the taxpayer's right to future annuity payments, even if the taxpayer's staying alive is a condition precedent to receiving payment); In re Perkins, 134 B.R. 408, 412 (Bankr. E.D. Cal. 1991) ("the secured status of the IRS's lien should be measured according to the present value of the stream of pension payments"); In re Robinson, 39 B.R. 47 (Bankr. E.D. Va. 1984) (tax lien attaching to debtor's military pension gave the Service a secured claim in the present value of the pension).

In the last few years Congress has authorized the IRS to serve continuous levies on "specified payments". Prior to the new law, the Service could serve continuous levies only on salary and wages. I.R.C. § 6331(e).

In the Taxpayer Relief Act of 1997 Congress authorized continuous levies upon up to 15% of "specified payments". I.R.C. § 6331(h). There are three types of specified payments. The new law defines specified payments to include federal payments other than those for which eligibility is based upon the payee's income, assets, or both. I.R.C. § 6331(h)(2)(A). Also included are the types of property exempted from levy under I.R.C. § 6334(a)(4), (7), (9), and (11). I.R.C. § 6331(h)(2)(B). Finally, specified payments include certain Railroad Retirement Act payments and Railroad Unemployment Insurance Act benefits. I.R.C. § 6331(h)(2)(A) and (C).

In the legislative history, Congress refers to social security payments as an example of a "specified payment" under this new law. The Conference Committee Report states, with respect to the new provision enacting I.R.C. § 6331(h), as follows:

The provision amends the Code to provide that a continuous levy is also applicable to non-means tested recurring Federal payments. This is defined as a Federal payment for which eligibility is not based on the income

and/or assets of a payee. For example, Social Security payments, which are subject to levy under the present law, would become subject to continuous levy.

H. Conf. Rep. No. 105-220 on P.L. 105-34, 105th Cong. 1st Sess. (1997) p. 549, 3 U.S.C.C.A.N. 1361 (1997), also reprinted in CCH Standard Federal Tax Reporter, ¶ 39,085.

This language in the legislative history may create certain hazards with respect to the IRS position that a single levy (not designated as continuous) attaches a taxpayer's entire social security benefit. A taxpayer may argue that Congress enacted § 6331(h) to enable a levy to capture future payments that a single levy would not otherwise attach. The committee report describes social security payments as a specified payment covered by the new law. Therefore, a taxpayer may argue, a levy designated as continuous is necessary to attach future social security payments. A new law authorizing a levy on future social security payments would not be necessary if present law already authorized such an action.

We believe that when Congress inserted this language in the committee report it simply did not consider the fact that a social security payment is a fixed right to a future benefit attachable by a single levy. The concept of a levy attaching fixed rights to future benefits remains established in the law. Nothing in the language of the law enacting I.R.C. § 6331(h) or its legislative history suggests that it is an attempt to eliminate or limit the reach of levies on such rights. A right to social security payments, like the rights to pension and annuity payments discussed above, is a fixed right to future payments. It is our opinion that in enacting § 6331(h) Congress did not intend to take from the Service the ability to levy on a social security benefit as a fixed right to a future benefit. As it did prior to enactment of the Taxpayer Relief Act of 1997, a levy attaches a taxpayer's entire social security benefit.

The language in the committee report quoted above is not necessarily superfluous. The Service may want to limit a levy on a taxpayer's social security benefit to 15% of the payments. By designating a levy on a taxpayer's social security benefit as continuous, the Service reaches only 15% of the future payments.

2. The Secretary has not delegated authority to issue continuous levies pursuant to I.R.C. § 6331(h).

I.R.C. § 6331(h)(1) provides, in part, as follows:

If the Secretary approves a levy under this subsection, the effect of such levy on specified payments to or received by a taxpayer shall be continuous from the date such levy is first made until such levy is released.

The Restructuring and Reform Act of 1998 amended I.R.C. § 6331(h) to require approval by the Secretary for a levy on specified payments to have continuous effect. The requirement applies to levies issued after August 5, 1997. Levies on specified payments not designated as continuous do not have continuous effect. See I.R.C. § 6334(f).

The Secretary has not yet delegated his authority to approve levies on specified payments. The Service published a Notice that states that it is developing procedures for issuance of a § 6331(h) continuous levy. These procedures will be announced before the Service issues any continuous levies on specified payments. See Notice 98-62, 1998-51 I.R.B. 15.

Any levies issued after August 5, 1997 on specified payments and designated as continuous would have been unauthorized. Levies on social security payments would have been proper to the extent that they could be construed as a single levy on the fixed unqualified right to the social security payment, as discussed in the first part of this discussion.

You provided us with a copy of a Form 668-W served on the Social Security Administration with respect to the tax liability of [REDACTED]. It is not identified as a continuous levy under I.R.C. § 6331(h). It reads as a wage and salary levy. It says in part, as follows:

This levy requires you to turn over to us: (1) this taxpayer's wages and salary that have been earned but not paid yet, as well as wages and salary earned in the future until this levy is released, and (2) this taxpayer's other income that you have now or for which you are obligated.

The Social Security Administration is obligated to pay the taxpayer his social security benefit, though it is not obligated to pay any wages or salary. The language of the levy is not tailored to the special circumstances of attaching the taxpayer's fixed and determinable social security benefit; however, it can be reasonably read as single levy attaching the social security benefit. It seeks amounts with respect to which the payor is obligated. It is an authorized levy attaching the social security benefit rather than an unauthorized § 6331(h) continuous levy on a specified payment.

If you have any questions on this matter please call Michael Calabrese of this office at (414) 297-4241. Our file is closed.

MARK J. MILLER
District Counsel

cc: Assistant Chief Counsel (General Litigation)
Attn: Chief, Branch 1